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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Trademark Management Company

Serial No. 75506617

Bert A. Collision and Gianfranco G. Mitrione of Lathrop & Gage L.C. for Trademark Management Company.

Carol Spils, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Bucher, Drost, and Zervas, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On 22 June 1998, Trademark Management Company¹ (applicant) applied to register the mark ALLEGRO (in standard character or typed form) on the Principal Register for goods ultimately identified as "sauces for pasta and pizza sold in bulk to restaurants and private and public institutions" in Class 30. The application identifies 16

¹ The application was assigned to Trademark Management Company in an assignment recorded at Reel/Frame No. 2320/0789.

March 1998 as the date of first use and the date of first use in commerce. Applicant has also submitted a translation of the mark as "quick," "brisk," and "lively."

The examining attorney² refused to register applicant's mark on the ground that its mark was confusingly similar to four registrations owned by two different parties for the following marks and goods:

I.

No. 2,476,011 (issued 07 August 2001)
Mark: ALLEGRA (typed)
Goods: Pasta (Class 30)
Owner: Fabrica de Pastas Alimenticias La Moderna S.A. de C.V.

II.

No. 1,120,655 (issued 19 June 1979 - Renewed)
Mark: ALLEGRO (typed)
Goods: Steak marinade (Class 30)
Owner: Allegro Fine Foods, Inc.

III.

No. 1,671,882 (issued 14 January 1992 - Renewed)
Mark: ALLEGRO (typed)
Goods: Salad dressing (Class 29) and spices, ketchup, vinegar, breadings and cakes (Class 30)
Owner: Allegro Fine Foods, Inc.

IV.

No. 2,121,707 (issued 16 December 1997 - affidavits under §§ 8 and 15 accepted and acknowledged)
Mark: ALLEGRO GOLD BUCKLE BRISKET SAUCE and design:³

² The current examining attorney was not the original examining attorney in this case.

³ The drawing of the mark in the registration does not clearly show the word "Allegro." The words "Brisket Sauce" have been disclaimed. Because of the lack of clarity of the mark in the USPTO's electronic database, we will not consider this registration in our likelihood of confusion analysis of the examining attorney's refusal based on the Allegro Fine Foods, Inc. registrations.



Goods: Marinade (Class 30)
Owner: Allegro Fine Foods, Inc.

The examining attorney argues that applicant's mark is confusingly similar to the '011 registration because the marks ALLEGRO and ALLEGRA are virtually identical and their meaning could be the same. Regarding the '665 and '882 registrations, the marks are identical. The examining attorney also submitted numerous copies of third-party registrations to show that marks are registered "with the same or similar goods" as those of applicant and registrants in this case. Brief at 4. In its brief, applicant argues that the goods are not related, the "activities surrounding the marketing of the goods under consideration here are so different that confusion of origin is not likely" (Brief at 7), and "no actual confusion is evidence of no likelihood of confusion" (Brief at 10).

After the examining attorney made the refusals final, this appeal followed.

When there is a question of likelihood of confusion, we look to the factors set out by the Federal Circuit and its predecessor court in cases such as In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003); Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000); and In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973).

Two important factors in likelihood of confusion cases concern the similarities of the marks and the relatedness of the goods. Regarding registration Nos. '665 and '882, the marks are for the identical word in applicant's mark, ALLEGRO. Concerning the '011 registration, the marks are ALLEGRA and ALLEGRO. The examining attorney (Brief at 3) points out that the applicant has admitted that the marks are virtually identical. See Response dated 30 October 2003 at 10 ("ALLEGRO and ALLEGRA are almost identical marks"). Furthermore, the examining attorney has provided a declaration from a translator to the effect that "the word allegra, as the feminine singular form of allegro, can be translated as 'cheerful.'" Final Office Action, attachment. The only difference between these two marks is the final letter, an "A" in the registration and an "O" in the application. The marks would be very similar in sound

and appearance. Indeed, many prospective purchasers may not recognize the difference in the final vowel. Also, while applicant has translated the term in its mark as "quick," brisk," and "lively" and registrant has translated the term as "happy" or "cheerful," the examining attorney has submitted evidence that both terms may be translated as "cheerful." Therefore, their meanings could be similar.⁴ In addition, many prospective purchasers not familiar with Italian or musical terms are likely to view the marks as arbitrary terms without any specific meanings. In that case, the difference in the last vowel would be even harder to remember. Finally, the commercial impression of ALLEGRO and ALLEGRA would likewise be very similar. For many prospective purchasers, they would simply be foreign-sounding words that would be hard to distinguish on the basis of the lack of identity of the last latter. We conclude that the marks ALLEGRO and ALLEGRA are very similar in sound, appearance, meaning, and commercial impression.

⁴ In addition, we note that the term "allegro" is an English word defined as a musical term meaning: "brisk or rapid in tempo." *The Random House Dictionary of the English Language (unabridged)* (2d ed. 1987). We take judicial notice of this definition. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

Next, we consider the goods of applicant and the registrants. Applicant's goods are sauces for pasta and pizza sold in bulk to restaurants and private and public institutions. Therefore, applicant in its identification of goods has limited its channels of trade to bulk sales to restaurants and private and public institutions. Applicant argues that "it is not reasonable to assume that the cited registrants will suddenly expand into the business of making pizza and pasta since they have been making the same products for years and it is not reasonable to expect that they will now change." Brief at 7. In addition, based on the affidavits of two of its private investigators applicant argues that "the cited registrants' products are sold in the retail channel of trade for purchase by individuals in their local supermarkets." Brief at 9.

Before we address the examining attorney's evidence concerning the relatedness of the goods, we will address some of applicant's points. Applicant's arguments are predicated on its evidence concerning what its private investigators discovered during their conversations with registrants' representatives about their products. However, in the registrations the goods are identified simply as pasta, steak marinade, salad dressing, spices, ketchup, vinegar, breadings, and cakes. The binding

precedent of the Federal Circuit makes it clear that we must consider the goods as they are identified in the identification of goods. Paula Payne Products v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods"). See also Octocom Systems, Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed"). Furthermore, it is not proper for the board to read limitations into a registrant's identification of goods. Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) ("There is no specific limitation and nothing in the inherent nature of Squirtco's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration").

In this case, the registrants' identifications of goods are not restricted in any way. Therefore, we must assume that the goods pass through all normal channels of trade for those items. Nothing limits the registrants' goods to sales in grocery stores to individual consumers and, therefore, we must assume that registrants' goods are distributed through channels of trade that would include in bulk distribution to restaurants and institutions. To the extent that the applicant's and registrants' goods would be sold to institutional food buyers, the channels of trade and purchasers would overlap.

The question then is whether the identified goods of applicant and registrants are related. We start by noting that the examining attorney has submitted numerous use-based registrations that show that pizza and pasta sauces are registered in a common registration along with pasta, marinade, or salad dressing. See Registration No. 2,614,774 for, inter alia, pizza sauce and pasta; No. 2,612,188 for "pasta; marinades, sauces..."; No. 2,504,532 for "pasta, gnocchi, vinegar and Italian sauces"; No. 2,536,020 for "pasta and sauce for pasta"; No. 2,751,620 for, inter alia, "sauce for pasta; pasta"; No. 1,705,254 for "pasta and sauce for pasta"; No. 1,477,926 for "pasta and sauces for pasta"; No. 2,813,177 for, inter alia,

"pasta, tomato sauces, vinegar"; No. 2,755,688 for, inter alia, "pasta" and "spaghetti sauces"; No. 2,790,465 for, inter alia, "pasta" and "sauces for pasta"; No. 2,623,992 for "pizza sauce; pasta..."; No. 2,098,403 for, inter alia "pasta sauce" and "marinades"; No. 2,660,036 for, inter alia, "marinades" and "pasta sauce"; No. 2,476,360 for "salad dressings, cooking sauces, marinades, marinara and other pasta sauces, and yogurt-based sauces"; No. 2,292,895 for "pasta sauce, marinades, tomato-based salad dressings, and barbecue sauce"; No. 2,442,406 for, inter alia, "pizza sauce, ketchup, marinades"; No. 2,150,765 for "multi-use sauce for pasta and rice, dipping sauce, and marinade, salad dressing"; and No. 2,801,667 for "mustards, marinades, hot sauce, salad dressings, pasta sauce."

These third-party registrations suggest that pasta and pizza sauce are associated with the same source as pasta, marinades, and salad dressings. In re Infinity Broadcasting Corp. of Dallas, 60 USPQ2d 1214, 1217-18 (TTAB 2001) ("The registrations show that entities have registered their marks for both television and radio broadcasting services. Although these registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nevertheless have probative value to the extent that they serve to

suggest that the services listed therein, including television and radio broadcasting, are of a kind which may emanate from a single source. See, e.g., In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993); and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 at n. 6 (TTAB 1988)".

It "has often been said that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services." In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991). See also Time Warner Entertainment Co. v. Jones, 65 USPQ2d 1650, 1661 (TTAB 2002). Here, the evidence suggests that pasta and pizza sauce and pasta, salad dressing, and marinade emanate from the same source. Therefore, we agree with the examining attorney that the goods in this case are related.

Applicant relies on In re Coors Brewing Co., 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003). However, this is not a case where the "evidence of overlap between beer and restaurant services is so limited that to uphold the Board's finding of relatedness would effectively overturn the requirement of *Jacobs [v. International Multifoods Corp.]*, 668 F.2d 1234, 212 USPQ 641 (CCPA 1982)] that a finding of relatedness between food and restaurant services requires 'something more' than the fact that restaurants serve food." Id. at 1064. Here, the evidence of the overlap between the food items in this case is not limited and the Jacobs requirement is not applicable. Quite simply, pasta sauce and pasta, salad dressing, and marinades are closely related and people are likely to assume that these goods, when marketed under similar marks, are associated with the same source.

Regarding the purchasers and channels of trade, there would certainly be an overlap. Purchasers of food items for restaurants and institutions are likely to purchase pasta sauce as well as pasta, salad dressing, and marinade. Also, as we indicated above, absent restrictions in the identification, we must assume that the goods travel in "the normal and usual channels of trade and methods of distribution." CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ

198, 199 (Fed. Cir. 1983). Therefore, we must assume that registrants' goods are sold through all channels of trade and distribution including distributing their goods through distributors that supply goods to institutions and restaurants. Thus, these channels of trade would overlap with applicant's restricted channels of trade in its identification of goods.

One other point that applicant makes is that there has been no actual confusion. The Federal Circuit has emphasized the traditional rule that the lack of actual confusion, particularly in an ex parte context, is often not significant:

With regard to the seventh DuPont factor, we agree with the Board that Majestic's uncorroborated statements of no known instances of actual confusion are of little evidentiary value. See In re Bissett-Berman Corp., 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, J.C. Hall Co. v. Hallmark Cards, Inc., 52 C.C.P.A. 981, 340 F.2d 960, 964, 144 USPQ 435, 438 (CCPA 1965), especially in an ex parte context.

Majestic Distilling, 65 USPQ2d at 1205. See also Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983); J & J Snack Foods Corp.

v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889, 1892
(Fed. Cir. 1991).

We point out that in an ex parte proceeding, registrants are not parties and they do not have an opportunity to present evidence to counter applicant's assertions. Certainly, in this case, we have no evidence that demonstrates that registrants agree that there has been no actual confusion. Therefore, while we consider that applicant is unaware of instances of actual confusion, we hold that this does not show that there is no likelihood of confusion.

The one unusual aspect of this case is the fact that the examining attorney cited registrations owned by two different parties. We emphasize that the issue here is whether applicant's mark is confusingly similar to the registrants' marks, not whether the registrants' marks are confusingly similar to each other. Indeed, the CCPA has held that: "nor should the existence on the register of confusingly similar marks aid an applicant to register another likely to cause confusion, mistake or to deceive." AMF Incorporated v. American Leisure Products, 474 F.2d 1403, 177 USPQ 268, 269 ((CCPA 1973).

When we consider all the evidence of record, we are convinced that there is a likelihood of confusion.

Applicant's mark is ALLEGRO and registration Nos. 1,120,655 and 1,671,882 are also for the identical mark ALLEGRO. These registrations are for steak marinade and salad dressing and applicant's goods are for pizza and pasta sauces. When marks are identical, goods do not have to be as close to hold that there is confusion. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) ("[E]ven when goods or services are not competitive or intrinsically related, the use of identical marks can lead to an assumption that there is a common source"). When the identical marks are used on these goods, prospective purchasers would likely think that the goods come from a common source.

Concerning registration No. 2,476,011, applicant admitted that the marks ALLEGRO and ALLEGRA are virtually identical. The goods, pasta and pizza sauce and pasta, are obviously complimentary items that would be purchased and used together. We agree that there would also be a likely of confusion when these marks are used on the identified goods.

Decision: The examining attorney's refusals to register are affirmed.